IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9005 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SAGAR SHRIKRISHAN AAHIR

Versus

POLICE COMMISSIONER OF AHMEDABAD

Appearance:

MR ANIL S DAVE for Petitioner

Mr. A.J. Desai, A.G.P. for the respondents no.1,2 3.

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 19/01/2000

ORAL JUDGEMENT

Heard learned Advocate Mr. Anil S. Dave for the petitioner and learned A.G.P. Mr. A.J. Desai for the respondents nos.1, 2 and 3.

1 The detention order dated 17-4-1999 passed by the respondent no.1-Police Commissioner, Ahmedabad City against the petitioner in exercise of powers conferred under Section 3(1) of the Gujarat Prevention of Anti Social Activities Act, 1981("PASA" for short) is challenged in the present petition filed under Article 226 of the Constitution of India.

2. The grounds of detention served to the petitioner under Section 9(1) of "PASA", copy of which is produced on record at Annexure "C" inter alia indicate that Prohibition Case bearing no.5042/99 has been registered against the petitioner on 14-4-1999 at Bapunagar Police Station wherein it has been alleged that Indianmade foreign liquor was seized from the possession of the petitioner-detenu. The said case is pending investigation.

The grounds of detention further indicate that two witnesses on assurance of anonymity have given statements against the petitioner on 15-4-99 and 16-4-1999 with regard to bootlegging activities of the petitioner.

3. That in consideration of the aforesaid material, the detaining authority has come to the conclusion that the petitioner is a bootlegger within the meaning of Section 2(b) of " PASA". That resort to general provisions of law being insufficient to prevent the petitioner from continuing his bootlegging activity and as such, the impugned order is passed.

4. The petitioner has challenged the impugned order on numerous grounds. It has been contended on behalf of the petitioner at the Bar that before passing the impugned order, the detaining authority has failed to consider the aspect of cancellation of bail as a less drastic remedy though available under Section 437(5) of the Criminal Procedure Code, and as such, on account of non application of mind, the subjective satisfaction reached by the detaining authority having been vitiated, the impugned order is rendered invalid.

5. As against that, learned A.G.P. Shri A.J.Desai has referred to and relied on the observations made by the Division Bench of this Court in the matter of NASIMBANU MUNNAMIYA SHAIKH VS. COMMISSIONER OF POLICE (1988(2) G.L.H. 475) and has vehemently urged that cancellation of bail cannot be considered to be relevant factor as less drastic remedy , and as such, non

consideration of this aspect is not relevant for deciding the validity of the order of detention. To support the submission, learned A.G.P. Mr. Desai has referred to and relied on the observations made in the aforesaid authority vide paragraphs 17 and 19 thereof.

6. It may be noted that in a subsequent judgment in the matter of ZUBEDABIBI RASIDKHAN PATHAN VS. STATE OF GUJARAT AND ORS. (1995(2) G.L.H. 1134), the Division Bench of this Court has expressed the view that non consideration of less drastic remedy like cancellation of bail under Sec.437(5) of Cr.P.C. amounts to non application of mind vitiating the detention order. That the said view has been approved and endorsed in the proceeding of Letters Patent Appeal no.1056/99 decided on 15-9-1999 by this Court (Coram: C.K. Thakkar & A.L. Dave JJ.)

7. It is true that while the matter of ZUBEDABIBI (Supra) was decided by the Division Bench of this Court, the decision rendered in NASIMBANU'S case (Supra) was not brought to the notice of the Court, and as such, the observation made in NASIMBANU'S case have not been considered while rendering the decision in ZUBEDABIBI'S case (Supra). However, it is pertinent to note that in NASIMBANU'S case (Supra), the Division Bench has construed the aspect of cancellation of bail granted to the detenu as accused in a case registered against him in the context of provisions contained in Section 473(3) of the Cr.P.C. whereby conditional bail is granted and cancellation is claimed on breach of condition by the detenu-accused. That the aspect of wider power for cancellation of bail and taking a person into custody under Section 437(5) has not been considered as one of the preventive measures to preclude the detenu from repeating or induling into antisocial activities by enforcement of general provisions of law. Further more, the decision rendered in the case of ZUBEDABIBI (Supra) by the Division Bench of this Court is subsequent in time and the view expressed therein being approved and endorsed by the Appellate Bench of this Court in the matter of YUNUSBHAI HASANBHAI GHANCHI VS. DISTRICT MAGISTRATE, BHAVNAGAR, in Letters Patent Appeal no.1056/99 decided on 15-9-1999 (Coram: C.K.Thakkar, Actg. C.J. & A.L.Dave,J.) would hold the field as good law.

8. That in the instant case, the petitioner was in police custody and the Sponsoring Authority could have produced the material before the concerned Court to oppose the grant of bail and if the bail was

granted,cancellation of the same under Sec.437(5) could have been claimed on basis of facts collected against the detenu and the detenu could have been prevented from continuing the alleged antisocial activities. Under the circumstances, I prefer to follow the ratio laid down in the matter of ZUBEDABIBI'S case (Supra) endorsed by the Appellate Bench of this Court and hold that , in the instant case, the detaining authority has observed in the grounds of detention that the petitioner-detenu being in police custody is likely to be produced before the Court and having got himself released on bail is likely to indulge into antisocial activity is mere apprehension and not a logical reason showing due application of mind on which an order of detention could be passed, and hence, the order cannot be sustained.

9. As the petition succeeds on the aforesaid grounds, it is not necessary to consider and decide the other contentions raised in the petition.

10. On the basis of the aforesaid discussion, the petition is allowed. The impugned order of detention dated 17-4-1999 passed by the Commissioner of Police, Ahmedabad (respondent no.1) is hereby quashed and set aside. The petitioner-detenu-Sagar Shrikrishna Aahir is ordered to be set at liberty forthwith, if not required in any other case. Rule is made absolute accordingly.

****

stanley-akt